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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Lockheed Martin Corporation,	)	
COMSAT Corporation, and	)	
COMSAT Digital Teleport, Inc.,	)	
	)	
Assignors	)	IB Docket No. 02-87
	)	
and	)	
	)	
Intelsat, Ltd., Intelsat (Bermuda), Ltd.,	)	
Intelsat LLC, and Intelsat USA License	)	
Corp.,	)	
	)	
Assignees	)	
	)	
Applications for Assignment of	)	
Earth Station Licenses and	)	
Section 214 Authorizations	)	

OPPOSITION OF LOCKHEED MARTIN CORPORATION, *ET AL.*, AND INTELSAT, LTD., *ET AL.* TO PETITIONS TO DENY AND PETITIONS TO CONDITION GRANT

David B. Meltzer,
General Counsel and Senior Vice President
Regulatory Affairs
Susan H. Crandall,
Assistant General Counsel
INTELSAT GLOBAL SERVICE CORPORATION
3400 International Drive, N.W.
Washington, DC 20008
(202) 944-6800

Keith H. Fagan,
Associate General Counsel
Robert A. Mansbach,
Assistant General Counsel
LOCKHEED MARTIN GLOBAL TELECOMMUNICATIONS
6560 Rock Spring Drive
Bethesda, MD 20817
(301) 214-3000

Lawrence W. Secrest, III
Rosemary C. Harold
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
Counsel to the Applicants

Gerald Musarra,
Vice President, Trade & Regulatory Affairs
Jennifer A. Warren
Senior Director, Trade & Regulatory Affairs
LOCKHEED MARTIN CORPORATION
1725 Jefferson Davis Hwy, Suite 403
Arlington, VA 22202
(703) 413-5812

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Lockheed Martin Corporation ("Lockheed Martin"), COMSAT Corporation, and COMSAT Digital Teleport, Inc. (collectively "COMSAT"), together with Intelsat, Ltd., Intelsat (Bermuda), Ltd., Intelsat LLC, and Intelsat USA License Corp (collectively "Intelsat") (COMSAT and Intelsat collectively the "Applicants") hereby submit their joint opposition to the petitions to deny and petitions to condition grant filed in the above-captioned proceeding. As a general matter, these petitions fail to identify any anticompetitive harms or other problems that can be fairly characterized as outgrowths of the proposed acquisition by Intelsat of COMSAT World Systems ("CWS"). Instead, they simply seek to leverage the pending assignment applications ("Application") to extract business concessions and benefits from CWS. In doing so, the petitions posit an unsupported and erroneous market definition and misconstrue the

meaning and implications of relevant provisions of the ORBIT Act, which stand as a bar to many of the unwarranted conditions sought.

I. INTRODUCTION AND SUMMARY

Three of the Applicants' carrier-customers—AT&T, WorldCom, and Sprint—as well as Verestar seek the imposition of conditions that, by government fiat, would radically alter the terms of their existing contractual relations with CWS. In addition, the requested conditions would hobble the private carrier operations of the now-privatized Intelsat through the imposition of a variety of stringent common carrier regulations, including rate prescriptions and structural separations.

Intelsat's proposed acquisition of CWS did not create the commercial arrangements that these carriers now seek to alter. The carriers are simply treating the pendency of the merger as a fortuity to be exploited in pursuit of a particular kind of "transaction tax"—a tactic that should be promptly and forcefully rejected by the Commission.

It is clear, moreover, that the demands put forth by these petitioners are devoid of supporting economic or legal analysis. For example, when Sprint and WorldCom characterize the provision of wholesale Intelsat services as a distinct product market, they do so without any effort to provide a serious economic analysis of the marketplace. In addition, they ignore established FCC precedent recognizing the existence of much broader markets that include multiple providers of both satellite and cable services (including their own undersea cable offerings).

In addition, in advancing arguments for imposition of common carriage obligations and structural separations, the petitioners ignore governing legal principles. In particular, certain petitioners attempt to find support for a common carriage mandate in the ORBIT Act provision establishing "Level III direct access" for Intelsat's treaty-based predecessor, the

intergovernmental organization ("IGO") known as INTELSAT.[1] These arguments fail to acknowledge that: (1) this provision ceased to be operative upon privatization; (2) the combination of Intelsat and CWS makes all access "direct"; and (3) a major post-privatization objective of the ORBIT Act was to enable Intelsat and its commercial satellite competitors to operate with a comparable degree of business flexibility.

The customer petitioners also ignore the fact that most of their claims and demands have been rejected in other FCC proceedings—specifically, those dealing with: (1) CWS's status as a non-dominant carrier, (2) direct access to the former IGO, and (3) the availability of capacity on the Intelsat system. Most recently, in the *Capacity Order*, the Commission rejected demands for abrogation of the existing CWS customer contracts and opted instead for a program of government-monitored commercial negotiations. As the agency is well aware, CWS has engaged (or sought to engage) in such negotiations, and has done so vigorously and in good faith. Indeed, in its most recent contract with COMSAT, WorldCom expressly acknowledged that the agreement represented "a satisfactory commercial solution of all current issues between the Parties relating to the provision of INTELSAT capacity" and affirmed that "further consideration of a regulatory solution of these issues is not required." Accordingly, there is no basis for further governmental intervention in these private contractual matters—and certainly no basis for such intervention in this assignment proceeding. Furthermore, consideration on the merits of these unfounded requests would force the Commission to confront the limitations of its authority under the ORBIT Act to abrogate contracts—and thereby also raise significant Fifth Amendment issues.

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[1] In keeping with the modification to the Intelsat name that accompanied its privatization, the fully capitalized term "INTELSAT" is used herein to refer to the pre-privatization IGO.

Finally, it should be noted that the rambling, 33-page petition submitted by LRT features a miscellaneous collection of claims, almost all of which previously have been considered and rejected by the Commission. The agency should firmly reject LRT's petition as meritless.

II. THE ASSIGNMENT IS CONSISTENT WITH RECENT STATUTORY AND REGULATORY DEVELOPMENTS

Petitioners' arguments for the imposition of conditions on the proposed transaction revive objections that they have repeatedly raised in earlier proceedings—all of which well predate the acquisition at issue here. Their omission of this highly relevant history warrants a brief review of the pertinent Commission and Congressional actions. As shown in the chronological summary below, government policymakers already have addressed the vast majority of petitioners' concerns or the underlying predicates for them. Still other issues already are being addressed in a separate pending FCC docket. The relevant developments are:

- ***COMSAT Non-Dominance Order* (1998)**[2]—As part of a series of deregulatory actions in the mid-1990s, the Commission determined that by virtue of vigorous competition in the U.S. international marketplace, COMSAT was a non-dominant carrier for the vast majority of the services it provided. In reaching that determination four years ago, the FCC recognized broad service market definitions that reflected the competition already flourishing. In the order, the agency concluded that COMSAT competed in the markets for switched voice and private line services against many submarine fiber optic cables and alternative satellite systems, while COMSAT's main competitors in the video services market were other satellite operators. The Commission at that time also recognized the potential for other satellite systems to compete more effectively for switched traffic and for cables to compete for video traffic—a development that has since come to pass.[3]

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2 *COMSAT Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd. 14083, 14099 (1998) (Order and Notice of Proposed Rulemaking) ("*COMSAT Non-Dominance Order*"). *See also Comsat Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services*, 12 FCC Rcd. 12059, 12084 (1997) (Order) ("*COMSAT Streamlined Video Order*"); *COMSAT Corporation; Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services*, 11 FCC Rcd. 9622, 9623 (1996) (Order) ("*COMSAT Partial Relief Order*").

3 *See COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14122-23.

- ***Alternative Rate Regulation Order* (1999)**[4]—Shortly after deregulating COMSAT's thick-route services in the *Non-Dominance Order*, the Commission concluded that it also would be appropriate to streamline its requirements for regulating COMSAT's "thin route" traffic, which at the time generated only about 8 percent of the CWS revenues. In establishing this "alternative rate regulation" scheme, the FCC confirmed that the broad service market definitions identified in the *COMSAT Non-Dominance Order* remained valid. In addition, the agency recognized that the number of thin routes was declining as new competition emerged, and that the regulatory scheme should be adjusted over time to reflect marketplace changes.

- ***Direct Access Order* (1999)**[5]—From the beginning of its existence until late 1999, COMSAT was the exclusive provider of INTELSAT capacity to customers in the United States. When the Commission decided to implement "Level III direct access"—*i.e.*, to allow U.S. customers to take service directly from INTELSAT—COMSAT maintained its contractual rights to certain INTELSAT capacity and continued to serve existing customers and seek out new business. U.S. customers, on the other hand, obtained the option of dealing directly with the IGO to obtain new services, and to move their existing traffic pursuant to contracts with Intelsat once their agreements with COMSAT came to an end. During the Direct Access proceeding, carriers argued that they should be able to void their contracts with COMSAT and be granted a "fresh look" at renegotiating those contracts. In mandating direct access, however, the Commission concluded that the competitive state of the marketplace did not justify carriers' calls for fresh look.

- **Enactment of the ORBIT Act (2000)**[6]—Congress enacted this statute in order to eliminate the outdated regulatory scheme that had shaped INTELSAT as an IGO and COMSAT as the U.S. Signatory to that body. The legislation contained many provisions intended to spur the privatization of INTELSAT in a pro-competitive manner, including the elimination of privileges and immunities that once shielded INTELSAT and COMSAT from suit. The ORBIT Act also mandated that U.S. customers be allowed to purchase capacity directly from INTELSAT prior to privatization. Finally, one provision in the statute called upon the FCC to review opportunities for Level III access to the system's capacity while also explicitly denying the agency any power to abrogate contracts in connection with that review.

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[4] *Comsat Corporation; Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation*, 14 FCC Rcd. 3065, 3065 (1999) (Report and Order) ("*Alternative Rate Regulation Order*") (finding the percentage of COMSAT business subject to effective competition stood at 92 percent as of 1998). The Commission subsequently permitted COMSAT to exit the business of providing occasional-use video services, so that element of the thin-route regulatory scheme is no longer operative. *See Section 63.19 Application of COMSAT Corporation; For Authority under Section 214 of the Communications Act to Discontinue the Provision of Occasional-Use Television, Occasional-Use IBS and Part-Time IBS Services*, 16 FCC Rcd. 22396, 22399 (2001) (Memorandum Opinion and Order).

[5] *Direct Access to the Intelsat System*, 14 FCC Rcd. 15703, 15725 (1999) (Report and Order) ("*Direct Access Order*").

[6] *Open Market Reorganization for the Betterment of International Telecommunications Act*, Pub. L. No. 106-180, 114 Stat. 48 (March 17, 2000) ("ORBIT Act").

- ***Capacity Order* (2000) and Ongoing Capacity Proceeding**[7]—In conformance with an ORBIT Act directive, the Commission opened a proceeding to review whether there was "sufficient" opportunity for customers that desired to obtain capacity directly from INTELSAT to do so. In its initial *Order* in the docket, the FCC concluded that the appropriate way to deal with this issue was to require COMSAT and potential direct access customers to "negotiate in good faith to find commercial solutions." The agency also stated that it would monitor the negotiations and consider other "appropriate action" if warranted. Since 2000, the Commission's staff has been regularly consulted by Lockheed Martin/COMSAT as negotiations have continued.

- ***Intelsat Licensing Order* (2000)[8] and Subsequent Privatization (2001)**—The Commission reviewed and approved the issuance of U.S. space station licenses to Intelsat in the months prior to the IGO's formal privatization on July 18, 2001 (at which point the licenses became effective). In taking those actions, the FCC concluded that Intelsat had privatized in a pro-competitive manner. The Commission specifically recognized that, by the terms of its privatization, Intelsat would provide services through contractual vehicles—its Distribution Agreement and Wholesale Customer Agreement—that treat former Signatories and non-Signatories the same with respect to the provision of transmission capacity. The agency concluded that the privatized Intelsat thereby satisfied "the intent of the ORBIT Act" to "allow for equal access" to its system.[9] The Commission also rejected calls to impose common carrier obligations on Intelsat's services, finding that nothing in the company's offerings or current marketplace conditions triggered the *National Association of Regulatory Utility Commissioners v. FCC* ("*NARUC I*") standard for mandating common carriage.[10]

- **Intelsat Privatization and the 1998 WTO Agreement**—As part of the privatization process, Intelsat pledged not to seek exclusive access to the markets of its former

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[7] *Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly*, 15 FCC Rcd. 19160 (2000) (Report and Order) ("*Capacity Order*").

[8] *Applications of Intelsat LLC; For Authority to Operate, and to Further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, 15 FCC Rcd. 15460 (2000) (Memorandum Opinion Order and Authorization) ("*Intelsat Licensing Order*"), *recon.*, 15 FCC Rcd. 25234 (2000) (Order and Reconsideration); *see also Applications of Intelsat LLC; For Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, 16 FCC Rcd. 12280 (2001) (Memorandum Opinion Order and Authorization) ("*Intelsat Privatization Order*").

[9] *Intelsat Privatization Order*, 16 FCC Rcd. at 12302.

[10] *See id.* 12300-02 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*")). The Commission noted that Intelsat was not itself offering the kind of services subject to "thin route" tariff protections under the *Alternative Rate Regulation Order*. *See id.* 12302. The Applications submitted in this proceeding make clear that Intelsat, in acquiring the CWS thin-route business for switched voice/private line service, has committed to continue to offer those services on a common carriage basis and subject to the existing rate protections.

> Signatories.[11] Similarly, the WTO Agreement has served to open formerly exclusive markets to new entrants: once WTO member nations allow Intelsat, LLC, a U.S. entity, to operate within their markets, they are obligated under the "Most Favored Nation" and "National Treatment" provisions to open their markets to all other providers from the United States and other WTO countries and to treat those foreign providers as they do their own domestic service providers.

The developments noted above reflect two intertwined forces at work in the U.S. international telecommunications marketplace during the last decade: the emergence of strong competition among providers of international telecommunications services, and policymakers' efforts to modify the laws and regulations governing INTELSAT and COMSAT to reflect these competitive changes. As a result, INTELSAT was encouraged to remake itself into the conventional private company that it now is—subject to the same market forces and regulatory obligations, and granted the same structural and operational flexibility, as other commercial satellite providers.

The *Intelsat Privatization Order* reflects the Commission's expectation that the new company, consistent with the goals of U.S. policymakers, would "have the same flexibility as any other commercial carrier to negotiate individual contracts with customers."[12] Since privatization, Intelsat has been moving forward on multiple fronts consistent with its new status. Like its satellite and fiber optic cable competitors, Intelsat currently operates as a private carrier and expects that it will respond to market demands in the future largely through private carriage offerings. Upon closing the CWS transaction, Intelsat like several of its rivals will offer some services on a common carrier basis (through a separate corporate entity). In addition, as explained in the Application, completion of the proposed transaction will result in the immediate termination of the existing capacity agreements between Intelsat and COMSAT for capacity not

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[11] *See Intelsat Privatization Order*, 16 FCC Rcd. at 12293-94, 12300, 12302-03.

[12] *Id.* 12302.

already sold by COMSAT. This means that any Intelsat capacity committed to COMSAT that becomes available as a result of the expiration of contracts with COMSAT's customers will be accessible for new business in a common pool of Intelsat capacity; this capacity pool will continue to expand as the existing contracts between COMSAT and its customers expire. All of these developments comport with and advance long-standing goals of U.S. policymakers.

III. THE CONDITIONS SOUGHT BY THE APPLICANTS' CUSTOMERS ARE PREMISED ON ANALYTICALLY DEFECTIVE FOUNDATIONS AND SHOULD BE CATEGORICALLY REJECTED

The extensive merger conditions requested by the customer petitioners in this proceeding are rooted in analytical foundations that are fundamentally flawed. First, the conditions sought clearly derive from parochial commercial motivations, none of which has even a remote connection to the proposed transaction. The Commission should flatly reject the petitions for this reason alone. In addition, all of these petitions are analytically flawed. WorldCom/Sprint build their entire case upon an absurdly narrow market definition—consisting solely of satellite capacity provided via the Intelsat system. Because this purported "market" is contradicted by a long line of Commission precedent and is unsupported by economic analysis, it follows that there is no basis for petitioners' related competitive concerns and proposed regulatory "conditions." Moreover, the petitions that cite to the ORBIT Act are anchored in legal standards that are irrelevant in today's regulatory environment and rest on a fundamental misunderstanding of the statute. Given the unsound premises on which these petitions rest, it necessarily follows that the conditions sought by the customer petitioners are equally flawed. The agency therefore should decisively reject them.

A. The Factual and Legal Underpinnings of the Customer Petitions Are Fundamentally Flawed

1. Petitioners Request Conditions That Have No Logical Connection to the Proposed Transaction

At the heart of the customer petitions are commercial matters that have no bearing on the proposed transaction. Rather than reflecting any legitimate competitive or policy-oriented concerns about the proposed combination of Intelsat and CWS, the complaints set forth in these petitions stem from a desire to achieve substantial government-mandated revisions to pre-existing contractual agreements that the petitioners voluntarily had accepted.[13] The proposed acquisition will have no impact on these contracts. In essence, these petitions were filed with the sole aim of altering past commercial agreements and gaining advantage in future negotiations.

The Commission has repeatedly recognized that there is no basis for imposing conditions on a proposed transaction that are not "merger specific." Specifically, the FCC has noted that its review must "focus[] on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction . . . ."[14] In this regard, the agency has emphasized that it "recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other applicants that have little if any relationship to the transaction. . . ."[15] These cautionary principles plainly apply to the matters raised by the petitions submitted here,

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[13] As support for the extensive conditions it requests, AT&T notes that such conditions can "provide[] important leverage in negotiations with Comsat." *See* AT&T Petition to Deny at 5 n.13, IB Docket No. 02-87 (filed May 28, 2002) ("AT&T Petition").

[14] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd. 6547, 6550 (2001) (Memorandum Opinion and Order).

[15] *Id.*

particularly because these issues have been or can be addressed elsewhere, including in a separate rulemaking proceeding that is now pending.

2. The Market Definition Set Forth in the WorldCom/Sprint Petition Is Unsupported by Economic Analysis and Is Inconsistent with Well-Established FCC Precedent

WorldCom and Sprint premise their entire petition on contrived claims concerning the structure of the marketplace.[16] Without providing supporting legal precedent or economic analysis, they assert that the relevant product market for purposes of analyzing the proposed merger consists solely of "U.S. wholesale Intelsat services."[17] They thus exclude a plethora of vibrant commercial satellite and submarine cable enterprises that the Commission repeatedly has found to be competitive with Intelsat and COMSAT. Petitioners then claim that, within this artificially constructed product market, the proposed merger would result in a horizontal combination of the largest and second-largest providers—CWS and Intelsat—and in a purported "significant vertical integration" of wholesale space segment and retail businesses.[18]

The Commission has concluded on numerous occasions that Intelsat and COMSAT compete with many alternative vertically-integrated satellite and fiber optic submarine cable systems.[19] The FCC's competitive analysis in the *COMSAT Non-Dominance Order*, for example, confirmed prior findings that "cable and satellite are fungible technologies" that should be considered as part of the same "product market" for the transmission of international switched

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[16] Tellingly, none of the other petitioners or commenters in this proceeding even has attempted to tie its request for merger conditions to any type of market analysis.

[17] Petition of WorldCom and Sprint to Condition Grant at 2, 10, IB Docket No. 02-87 (filed May 28, 2002) ("WorldCom/Sprint Petition").

[18] *Id.* at 8, 9. This argument is not only flawed as a matter of competition analysis but also is contrary to an important policy underlying the ORBIT Act—to foster the transformation of Intelsat into a conventional private company that would compete, and be regulated, like its rivals in the marketplace.

[19] For a meaningful competitive analysis, "the relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'" *United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001) (en banc) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)).

voice services.[20] In the *COMSAT Direct Access Order*, the FCC observed that "over 77 U.S. facilities-based carriers operating in the United States" were vigorously competing with COMSAT to provide "a wide array of voice, data and video services over fiber optic cable and satellite."[21] The agency similarly has recognized that Intelsat now "faces competition globally from both . . . satellite systems and fiber optic submarine cable systems."[22] Moreover, in recent merger proceedings involving U.S. international telecommunications service providers, the Commission has grouped both satellite and fiber optic cable providers into a broadly defined U.S. international telecommunications product market.[23]

Given the baseless nature of the WorldCom/Sprint market definition, it follows that the asserted "competitive concerns" that rest on this foundation are equally infirm.[24] Thus, there is no foundation for claims that the proposed transaction will result in any "horizontal" or

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[20] *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14103. As noted in the initial Application, although the FCC formerly categorized COMSAT and other satellite entities as competing in specific service-oriented markets—such as the "switched voice" and "private line" markets—the agency recently has suggested that it is more appropriate to conceive of satellite capacity as a broader product offering because of the ability to provide multiple services over the same satellite capacity. *See, e.g., Application of General Electric Capital Corp. and SES Global for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act,* 16 FCC Rcd. 17575, 17591-92 (2001) (Order and Authorization) ("*GE/SES Global Order*").

[21] *Direct Access Order*, 14 FCC Rcd. at 15725.

[22] *Intelsat Licensing Order*, 15 FCC Rcd. at 15463-64.

[23] *See, e.g., GE/SES Global Order,* 16 FCC Rcd. 17575; *Application of VoiceStream Wireless Corp., Poertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, 16 FCC Rcd. 9779 (2001) (Memorandum Opinion and Order) (*"Deutsche Telekom/VoiceStream Order"); ICO-Teledesic Global Limited; Application for Transfer of Control of Space Station License of Teledesic LLC to ICO-Teledesic Global Limited*, 16 FCC Rcd 6403, 6406 (2001) (Memorandum Opinion Order and Authorization; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18039, 18070 (1998) (Memorandum Opinion and Order).

[24] WorldCom/Sprint Petition at 2.

"vertical" competitive concerns.[25] Accordingly, the Applicants have received "early termination" of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act.[26]

3. Several of the Petitions Are Built on Obsolete Legal Standards and a Fundamental Misunderstanding of the ORBIT Act

In order to bolster their requests for imposing extensive conditions on the proposed transaction, several of the petitions rely on legal standards that effectively have been superseded by the privatization of Intelsat. The AT&T petition is mired in antiquated legal assumptions that predate Intelsat's privatization and ignore today's regulatory environment.[27] The WorldCom/Sprint petition similarly attempts to use the now legally moot concept of "direct access" in support of its request for conditions.[28] In a one-paragraph argument, Verestar calls for fresh look rights with respect to its existing contracts with COMSAT, a request that would force the FCC to confront the limitations of its authority under the ORBIT Act to abrogate contracts.[29]

Put plainly, the ORBIT Act and the privatization of INTELSAT have converted the former IGO into a private company—designed to compete on an equal footing with other commercial satellite entities such as PanAmSat and SES Global. Recent law and policy changes, outlined above in Section II, demonstrate that there is no basis to claim that Intelsat should be subject to a different regulatory regime from that governing other satellite firms. To the contrary, imposing such inequitable obligations on Intelsat would be directly contrary to a

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25 *Id.* at 8-9.

26 *See* Early Termination Grant Letter from Sandra M. Peay, Senior Contact Representative, Federal Trade Commission, to Bert Rein, Wiley Rein & Fielding (April 5, 2002).

27 *See* AT&T Petition at 2-8.

28 *See* WorldCom/Sprint Petition at 3-5.

29 *See* Letter of Verestar, Inc. to Condition Grant, IB Docket No. 02-87 (filed May 24, 2002) ("Verestar Letter"). The Applicants admit that it is difficult to discern the legal basis for Verestar's request, because it specifies none.

critical purpose and intent of the ORBIT Act: creating parity in the regulatory treatment of Intelsat and competitive satellite operators.

AT&T in particular seriously misconstrues the terms of the statute. It contends that the ORBIT Act entitles it to "direct access to INTELSAT telecommunications services and space segment capacity" at "the level commonly referred to by INTELSAT . . . as 'Level III.'"[30] As a matter of statutory construction, AT&T is simply wrong. "Direct access" ceased to have any legal meaning or business significance when INTELSAT privatized in July 2001. Section 641 of the ORBIT Act, upon which AT&T relies, provides only for "direct access to *INTELSAT* telecommunications services."[31] The ORBIT Act carefully defines the term "INTELSAT" to mean the "International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization."[32] In contrast, the private Intelsat is what ORBIT defines a "successor entity": "any privatized entity created from the privatization of INTELSAT."[33] ORBIT makes no provision for "direct access" to "successor entities." Thus, AT&T's entire argument lacks a statutory foundation. In any case, the proposed transaction will not change the fact that carriers already have the option of purchasing Intelsat capacity either directly from Intelsat itself or from any of its resellers—an option uniquely offered by Intelsat.

Recent Commission action is consistent with the language of the ORBIT Act. In its 2000 *Capacity Order*, the FCC acknowledged that the specific "direct access" provision in Section 641(b) of the ORBIT Act refers only to "INTELSAT," and that "INTELSAT" and "successor

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30 AT&T Petition at 2 (citing 47 U.S.C. § 765(a)) (emphasis omitted).

31 47 U.S.C. § 765(a) (emphasis added).

32 ORBIT Act, § 681(a)(1).

33 *Id.* § 681(a)(7).

entity" are separate legal entities.[34] Nevertheless, the agency—in *dictum* that AT&T now seizes upon—suggested that it might have some regulatory power post-privatization to ensure that the benefits of direct access are not lost.[35]

Although that legal issue is not resolved, subsequent events have addressed the Commission's concerns. As noted above in Section II, after thoroughly reviewing the final privatization documents, the FCC in the *Intelsat Licensing Order* held that the privatization would allow direct access users the same opportunities as former Signatories to obtain Intelsat capacity and, thus, would carry forward the intent of Section 641.[36] The Commission's later report to Congress reiterates the same finding.[37] Last but not least, AT&T ignores the record of successful commercial negotiations pursuant to the *Capacity Order*.[38] Thus, the factors giving rise to the Commission's reservations regarding the expiration of the ORBIT Act provisions related to INTELSAT IGO have been satisfactorily addressed.

Accordingly, AT&T's misconstruction of the ORBIT Act provides no more foundation for imposing conditions on the proposed transaction than does WorldCom's and Sprint's mischaracterizations of the competitive state of the marketplace. Moreover, AT&T's application of now-obsolete ORBIT Act terminology to a post-privatization environment should not obscure

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34 *Capacity Order,* 15 FCC Rcd. at 19180.

35 *Id.* This *dictum* falls far short of resolving the legal argument over the scope of the FCC's power to act post-privatization. In any event, the Commission itself deferred a definite interpretation until a later date, following its consideration of the final privatization and the result of the commercial negotiations pursuant to the *Capacity Order*.

36 *Intelsat Privatization Order*, 16 FCC Rcd. at 12302.

37 *FCC Report To Congress As Required By The ORBIT Act*, FCC 01-190, at 8 (June 15, 2001).

38 AT&T also refers to COMSAT's alleged mark-up over the former Intelsat Utilization Charge as support for its call for conditions in this proceeding. *See* AT&T Petition at 3 n.8. In addition to the fact that this issue has no relevance in the post-privatization era, the Commission has found that the alleged "mark-up" calculation is not a useful indicator for measuring COMSAT's profit margins. *See* Letter from FCC to Rep. Thomas Bliley, Chairman, House Telecommunications Subcommittee, December 22, 1997.

the fact that the policymakers' goal of obtaining the benefits of direct access has been achieved. AT&T and other customers can and do deal "directly" with Intelsat today, negotiating carriage terms just as customers do with any other satellite service provider. The proposed transaction will further enhance the benefits of direct access through the reversion of COMSAT capacity to Intelsat upon the expiration of COMSAT customer contracts.

B. The Conditions Requested by the Customer Petitioners Are Illogical and Should Be Flatly Rejected

As reflected in the preceding discussion, there is no legitimate basis for the extensive conditions that the Applicants' customers seek to impose on the proposed transaction. When the requested conditions are viewed under prevailing market conditions and the appropriate regulatory standards, it immediately becomes clear that none of them has any legal or logical foundation:

- The calls by WorldCom/Sprint and Verestar to modify their existing CWS contracts are groundless in light of the abundant competition for U.S. international facilities and the stringent Commission standard for imposing this extraordinary remedy (neither of which is discussed by the parties seeking these conditions).

- The requests of AT&T and WorldCom/Sprint for common carriage and other nondiscrimination conditions ignore the well-established legal test for imposing such burdensome regulations, as well as the FCC's prior decision to reject the imposition of such conditions on Intelsat.

- Likewise, the calls from WorldCom, Sprint, and AT&T for structural separation conditions are hopelessly devoid of legal or economic justification.

- Finally, WorldCom and Sprint do not even attempt to support their request to substantially modify the existing thin-route regulations.

The discussion below sets forth the bases upon which the Commission should reject each of these requests.